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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1941

No. 1181

316 US # 25
ROY-SC R

ROYAL INSURANCE COMPANY, LTD. (a Corporation),
Petitioner,

vs.

ROBERT A. SMITH,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The petition of Royal Insurance Company, Ltd., a corporation, respectfully shows:

This is the third petition for a writ of certiorari in this cause. Each of the prior petitions[1] was denied

[1]October Term 1937, No. 806; October Term 1940, No. 307.

without comment; neither, however, sought to review a final determination of the cause by the Circuit Court of Appeals. The case has now been tried for the third time in the District Court which (for the third consecutive time) entered judgment for petitioner; the Court of Appeals (in its fourth decision herein) reversed the judgment and remanded the cause with directions to enter final judgment for respondent (R. 237).

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

This is an action at law upon a valued policy of leasehold insurance, written on the California standard form of fire insurance policy, and covering—

> "$15,000.00—On assured's Leasehold Interest in property located on the Beach Road on the westerly shore of Belvedere Cove, . . . being a two-story, frame-stucco, hard roofed dwelling house.
>
> This insurance is predicated upon lease to land above described held by the assured from the Trustees of the City of Belvedere, California, to which there is paid a monthly rental of three dollars ($3.00)." (R 3)

The litigation revolves about two inquiries:

> (1) "This suit . . . is on a valued policy of fire insurance upon [respondent's] 'leasehold interest' in certain property . . . The prior appeals were concerned with the question whether [respondent] had . . . proved an insurable interest of a kind described in his policy . . . On the

last appeal we held that [respondent] had established his case in that respect . . ."

Opinion, Circuit Court of Appeals, on last (fourth) appeal herein (R 232).

(2) "The issue presented on the [affirmative defenses] . . . is as follows: where a plaintiff, seeking an insurance policy, represents to defendant insurer that the leasehold to be insured is one for a term running until the destruction of his property, but actually it is a month-to-month tenancy; and the insurance contract is entered into upon the mutual assumption that the leasehold is of the nature represented by plaintiff, is defendant liable on the contract?

Opinion, District Court, on last (third) trial herein (R 25, 26).

JURISDICTION.

Jurisdiction of this Court is invoked under Section 240 of the Judicial Code (U.S. Code, Title 28, Section 347), and Rule 38 of the Revised Rules of the Supreme Court.

The judgment of the Circuit Court of Appeals was filed and entered January 23, 1942 (R 238), reversing judgment of the District Court in favor of petitioner and ordering final judgment for respondent. Petition for rehearing was seasonably filed and was denied without opinion March 11, 1942 (R 239). Issuance of mandate has been stayed to April 30, 1942, and thereafter until disposition of this petition (R 239; and Order dated April 10, 1942).

QUESTIONS PRESENTED.

I. Must not the language of a contract of insurance be given the meaning that common speech imports, rather than a technical legal definition?

(The policy terms "lease" and "leasehold" in a policy of leasehold insurance do not comprehend a month-to-month tenancy.)

II. What is the test to be applied on appeal to determine whether findings of fact made by a trial Court are "clearly erroneous" within the meaning of Rule 52(a) FRCP?

REASONS FOR GRANTING WRIT.

I.

1. CONSTRUCTION OF THE CONTRACT BY THE CIRCUIT COURT OF APPEALS.

The meaning of the words "lease" and "leasehold" as used in the insuring clause of the policy was established as the law of the case[2] by the third opinion of the Court of Appeals (SR 366, 371-3; 111 F2 667, 670-1; 130 ALR 812, 816-7):

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[2]The Court of Appeals made this clear in its last (fourth) opinion herein (R 232):

> "The prior appeals were concerned with the question whether appellant [respondent herein] had alleged and proved an insurable interest of a kind described in his policy, namely, an estate in the nature of a leasehold. On the last appeal we held that appellant had established his case in that respect, but that the insurer [petitioner] should be given an opportunity to set up such affirmative defenses as might be available to it. The present appeal relates to the proof of these defenses."

"A tenancy at will may arise as a result of the taking of possession of land by permission . . . without any understanding as to the duration of the possession; and this tenancy may, by reason of the reservation or payment of rent, be changed into a periodic tenancy . . . *Here, through the monthly payment and acceptance of rent, a month-to-month tenancy existed* . . .

Notwithstanding lack of proof of a formal lease, we think it must be held that the policy properly described [respondent's] estate as a lease or a leasehold interest.[3] *The definition of these terms appears to embrace, in effect, any agreement, whether express or implied, which gives rise to the relationship of landlord and tenant.*" (Emphasis ours.)

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2. AN IMPORTANT QUESTION OF GENERAL LAW IS INVOLVED.

Leasehold insurance is an important and rapidly growing branch of the insurance business. In a leasehold insurance policy the words "lease" and "leasehold" are of primary significance. The construction of these words presents a question of general public interest, and one of real concern to the insuring public and insurance companies alike. It is a question which has not been but should be settled by this

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[3]It should be emphasized (—the evidence being wholly without conflict on this point) that at no time prior to issuance of the policy or prior to the fire did the parties have any discussion whatever concerning a month-to-month tenancy. The only tenure talked about was a tenure commensurate with the life of the improvements; that is, tenure for a term running at all events until destruction of the building.

Court, especially since it is one of first impression so far as we are aware.[4]

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3. THE DECISION IS IN CONFLICT WITH GENERAL INSURANCE LAW.

Insurance contracts, like other contracts, are to be taken and understood in their plain, ordinary, and popular sense.

> *Imperial Fire Ins. Co. v. Coos County,* 151 US 452, 14 SCt 379, 38 LEd 231;
>
> *Aschenbrenner v. United States Fidelity & G. Co.,* 292 US 80, 54 SCt 590, 78 LEd 1137.

The words "lease" and "leasehold" have a well understood meaning in ordinary, popular, and daily usage. They mean that there is in existence between lessor and lessee a definite arrangement as to the duration of the tenure for a fixed or determinate period known as the term. They are not commonly used to refer to a tenancy at will or a tenancy from month-to-month. Indeed, the primary thought embodied in their usage is the reference to *something more* than a tenancy at will or from month-to-month.

This meaning has been universally recognized by lexicographers and courts, and has been universally

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[4]This (third) opinion of the Court of Appeals is reported in 130 ALR 812, annotated on the question—"What amounts to a leasehold interest within insurance policy". The annotator says (p. 818):

> "No cases other than *Smith v. Royal Ins. Co.* (CCA 9th) (reported herewith) ante, 812, involving the question under annotation, have been found."

distinguished by them from the technical definition of these words taken from the law of landlord and tenant.

In choosing the latter meaning and rejecting the former, the Court of Appeals committed serious error. It has decided an important question of local law in a way probably in conflict with applicable local statutes and decisions.

California Civil Code, Section 1644:

"The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning . . ."

Burr v. Western States Life Ins. Co., 211 Cal. 568, 296 P 273, 275-6;

Bastian v. British Amer. Assur. Co., 143 Cal. 287, 77 P 63, 64.

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4. **THIS COURT HAS GRANTED CERTIORARI IN LIKE CASES.**

Aschenbrenner v. United States Fidelity & G. Co., 292 US 80, 54 SCt 590, 78 LEd 1137.

In that case the Supreme Court granted certiorari and reversed a judgment of the Ninth Circuit Court of Appeals for the identical error in construing a policy of insurance which that Court has, we respectfully submit, repeated in the case at bar.

"The only question which it is necessary to decide here is whether the insured was a 'passenger' at the time of the accident within the meaning of the policy. The Court of Appeals ruled that

he was not; it reached this conclusion by applying the term as it was said to be defined in the law of common carriers." (292 US, 82-3; 78 LEd, 1139)

II.

1. BLANKET REJECTION OF TRIAL COURT'S FINDINGS OF FACT.

The trial Court made detailed findings of fact on the affirmative defenses of misrepresentation, mutual assumption proving false, and rescission (Findings VII-IX; R 38-40). These are well summarized in the memorandum opinion of the District Court (R 25, 27-9):

> "The testimony of plaintiff's [respondent's] insurance broker shows that he believed, and so represented to defendant [petitioner], that the interest upon which he was seeking insurance was one which would last until the property should be destroyed by fire or by other cause (Tr. 24-5, 29; 319, 331[5]). This testimony is confirmed by defendant's insurance agent who prepared the policy in question (Tr. 34, 35, 40, 45[6]), and who was led to believe that plaintiff's tenure was that which plaintiff's broker represented it to be (Tr. 47-8[7]) . . . But instead of possessing an interest terminable only upon the destruction of the premises, plaintiff had a month-to-month tenancy . . . Defendant's expert witnesses have testified that no reputable fire insurance company, acting in the

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[5]R 148-9, 154; SR 319, 331.
[6]R 90, 92, 98, 105.
[7]R 108.

usual course of business, would knowingly issue a leasehold policy on such a tenure (Tr. 21, 26, 28[8]). Thus, the evidence shows that defendant, relying upon a material misrepresentation by plaintiff, prepared a policy which it does not issue in the course of its business, and which it has constantly sought to rescind. . .

. . . The record is clear that plaintiff's broker misrepresented the extent of the leasehold interest upon which defendant issued the policy. Since the representations related to the subject of insurance itself, there is no doubt as to their materiality (Citations).

By reason of the misrepresentations made by plaintiff's broker, both parties were misled into drawing up the instrument which is the subject matter of this action. They assumed something to be so which was not so, namely, that plaintiff had a leasehold interest in a Belvedere estate terminable only upon the destruction of the property . . .

The record supports the affirmative defenses of (1) misrepresentation of a material fact, which led to the making of the contract upon which plaintiff relies, and (2) mutual assumption proving false . . .

It is ordered that judgment be entered in favor of defendant, upon repayment to plaintiff of the insurance premiums, plus interest, as offered . . ."

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[8]R 73 (answering question at R 66), 79, 82-3. This expert testimony is without conflict in the record.

a. Rejection of finding of reliance upon the representation.

The opinion of the Court of Appeals states the basis for the rejection of this finding[9] (R 232, 233):

> ". . . [Petitioner], so it says, was given to understand that [respondent] had an interest which 'ran until the property was destroyed'. It would not, it claims, have insured the risk otherwise. Yet in drafting the policy it consciously chose not to describe the interest in the terms represented . . . Presumably the Royal Insurance Company is an experienced and careful underwriter. If it had received positive assurance that [respondent's] interest ran for the life of his building it is incredible that the company would deliberately have omitted so to characterize the interest in the insurance contract."

In short, rejection of the finding is rested solely upon a factual inference drawn by the Court of Appeals from a single fact in the case: *The policy did not embody the representation as an express warranty; hence, the insurer could not have relied on it.*

If valid, this reasoning would demolish the defense of misrepresentation in every suit on every insurance policy as a matter of law, because the underwriter ("presumably . . . experienced and careful") omitted to specify in the policy itself that the representation

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[9]The trial Court found (VII; R 38-9)—

> "that defendant issued the said policy in reliance upon the truth of said statements [regarding tenure] and each of them . . .; that defendant would not have issued the said or any policy of insurance to plaintiff had it been informed of the true facts regarding plaintiff's tenure . . ."

must be true. It must follow that the reasoning is not valid.[10]

Moreover, the Court of Appeals simply ignored the evidence. Petitioner's witness Evans testified without qualification and without contradiction that he and petitioner relied on Hanley's (respondent's broker) statements regarding respondent's tenure (R 102-3); and that such reliance without independent investigation by petitioner was in accordance with the usual practice and custom of petitioner (R 102). Three expert witnesses testified without contradiction that this practice accorded with the usual custom of the fire insurance business (R 73-5; 80; 83).

Hanley himself, testifying for respondent, said:

> "Q. There isn't any doubt . . . that you and Mr. Evans worked on the assumption that there was a lease in effect . . . which entitled Keil [respondent's original predecessor in interest] and his successors to a tenancy of that property as long as the building remained standing? A. That is right." (R 148)
>
> "Q. And you worked on the assumption that there was a lease between the Belvedere Land Company [the town's grantor] and Smith's [respondent's] predecessors in interest? A. That is correct; . . . in other words, the company would not have issued the policy, or Matt Evans would not have approved of the policy unless we thought there was a lease."

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[10]The California standard form fire policy used here provides (SR 36):

> "This entire policy shall be void . . . if the insured has concealed or misrepresented any material fact or circumstances concerning this insurance or the subject thereof . . ."

Finally, three expert witnesses testified without contradiction that no reputable fire insurance company, acting reasonably and naturally in the usual course of the fire insurance business, would have accepted a risk for a leasehold policy if it knew that the interest to be insured was merely a month-to-month tenancy (R 73, 79, 83). This evidence established the materiality of the representation.[11] And the fact of reliance is reasonably inferrable from the fact of materiality.

It is submitted that the Court of Appeals exceeded its appropriate appellate function in substituting its own factual inference (however permissible that inference may have been as a matter of abstract logic) for the equally permissible inference of the trial Court, especially since the former inference is precisely at variance with *all* of the testimony directly relevant to the issue. (Rule 52(a), FRCP)

b. Rejection of finding that respondent did misrepresent his tenure.

To reach the conclusion that this finding[12] was "clearly erroneous", the Court of Appeals was forced to eliminate from consideration the testimony of petitioner's witness Evans. This it did by characterizing

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[11]29 *Am. Jur.* 424; Insurance, Section 525;
California etc. Ins. Co. v. Feinstein, 15 Cal. (2d) 413, 101 P2 696, 701-2.

[12]The trial Court found (VII; R 38):
"Plaintiff stated to defendant that he held a lease to the land on which stood the building described in said policy; that said lease was for a term running to, and not expiring until, the destruction of said building by fire or other casualty."

his testimony as "so vague and equivocal as to render (it) worthless" (R 234). Admittedly, as the opinion points out in a footnote (n. 4, R 234), Evans testified that respondent's broker told petitioner "that this lease ran until the property was destroyed"; and that Evans "several times testified positively that he was told that Mr. Smith (respondent) had a lease".

The trial Court had an opportunity to judge of the credibility of witness Evans; the appellate Court did not. The trial Court accepted Evans' testimony; the appellate Court, we submit, was not empowered to summarily erase it from the record. (Rule 52(a), FRCP)

Moreover, the finding that the representation as to tenure was in fact made does not rest wholly (or even principally) on the testimony of Evans, despite the strong intimation to the contrary in the opinion.[13] Respondent's broker, by whom the policy was procured, testified as a witness for respondent (SR 331-2):

> "Q. It is a fact, is it not, that the lease you and Mr. Evans were talking about was a lease which ran until the building was destroyed; is that not correct? A. That would be correct . . .
>
> Q. . . . Did you or did you not tell Mr. Evans that Mr. Smith had a lease to the property? A. I told Mr. Evans that Mr. Smith had a lease to the property through his predecessors,

[13] "To prove the making of the representation [petitioner] called its agency superintendent [Evans], who had been solicited to procure the writing of the policy." Opinion, Court of Appeals (R 234)
The opinion does not refer to any other testimony on this point.

through Bland, through Keil and to himself . . . I made the statement to Mr. Evans that Mr. Smith had a lease from the Town of Belvedere, through his predecessors in interest, Mrs. Bland and Mr. Keil . . .

Q. You did tell Mr. Evans, didn't you, that Mr. Smith held a tenancy of the property as long as his building remained on the property? A. That is correct."

Since no other witnesses than Evans and Hanley (the broker) testified to the transactions leading to issuance of the policy, Hanley's testimony must be the "countervailing proof" referred to in the opinion of the Court of Appeals (R 235). The trial Court, who heard the testimony in open court, certainly did not construe the testimony of Hanley as "countervailing proof" to that of Evans.[14] But if we assume that Hanley and Evans gave contrary testimony on this point, there would still be but a conflict in the testimony.

The resolution of this conflict was for the trial Court, and not for the Court of Appeals. (Rule 52(a), FRCP)

c. Rejection of finding of falsity of the representation.

The Court of Appeals rejects the finding (VI, R 36; VII, R 38-9; VIII, R 39) that at all times respondent

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[14] "The testimony of [respondent's] insurance broker shows that he believed, and so represented to [petitioner], that the interest upon which he was seeking insurance was one which would last until the property should be destroyed by fire . . . This testimony is confirmed by [Evans] . . ." Opinion, District Court (R 27).

occupied the property as a month-to-month tenant, and that therefore the representation that respondent had a tenure commensurate with the life of the building was false.

The basis for this rejection is that "the record affords no satisfactory answer" as to what tenure respondent had,[15] and since the burden of proving the representation false rested on petitioner the doubt should have been resolved against it (R 236-7).

The record is remarkably full and complete on the nature and extent of respondent's tenure, covering the entire period from 1890 to 1932. It includes all recorded documents; all pertinent minutes and official records of the town back to 1897 when it acquired the property; all pertinent books and records of the town's grantor back to 1890, when the house was built by respondent's first predecessor in interest; all available tax bills of both town and county, certified copies

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[15]The opinion intimates (R 237) that respondent may have had more than a month-to-month tenancy by virtue of an estoppel of the town based upon its "complacent attitude".

But it is undisputed that the town did not own this property in its corporate capacity; the property had been acquired and was held exclusively for the use of the public. (See the first opinion of the Court of Appeals herein, 77 F2 157, analyzing the provisions of the 1896 deed by which the town acquired the property.)

The law is well settled that tenure by estoppel may not be acquired in property so held.

Simons Brick Co. v. Los Angeles, 182 Cal. 230, 187 P 1066, 1068-9;

La Societa, etc. v. San Francisco, 131 Cal. 169, 63 P 174;

Snyder v. Mt. Pulaski, 176 Ill. 397, 44 LRA 407.

of assessment rolls of the town, and the testimony of the town assessor.[16]

In addition, the record contains direct declarations by two of respondent's predecessors in interest which, in themselves, are sufficient to support the finding that respondent was no more than a month-to-month tenant.[17]

(a) Respondent called Mrs. Preusser as a witness on tenure. On cross-examination she admitted authorship of the following letter (SR 159-60):

> "Legally this home is personal property; because when it was first placed on the beach, my uncle, Mr. Hugo D. Keil, who built the original part of it . . . made a verbal agreement . . . that if they would allow him to build on the beach, he would waive all Squatter's rights and agree to remove the house at any time on demand; and therefore, the house . . . must be classified as personal property. As such it should be appraised . . . at a nominal figure, taking into consideration that the agreement to remove might be enforced at any time . . ."

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[16]By California law all leasehold interests are assessable as personal property. Where leased land is owned by a municipal corporation, it is mandatory that the value of the leasehold be assessed to the lessee and a tax thereon paid by him.

Hammond Lumber Co. v. Los Angeles, 104 Cal. App. 235, 285 P 896, 898.

No such assessment was ever made to, nor tax paid by, respondent or any of his predecessors in interest.

[17]*California Code of Civil Procedure,* Section 1849:

> "Where . . . one derives title to real property from another, the declaration . . . of the latter, while holding the title, in relation to the property, is evidence against the former."

(b) Respondent's immediate predecessor in interest was the Crocker First Federal Trust Company, acting as executor and testamentary trustee with reference to this property. Petitioner introduced in evidence (SR 348-9) the federal estate tax return prepared and executed by the Trust Company. This states as "Nil" the value of "any and all interest that (testatrix) has or could have in and to the real property whereon" the house in question was located.

As a matter of fact, neither the District Court nor the Court of Appeals have had the slightest trouble in ascertaining the nature and extent of respondent's tenure from the evidence in the case, up to the time of the last (fourth) appeal. On the first trial herein the District Court found that respondent had a month-to-month tenancy.[18] On the first appeal, this finding was approved.[19] On the second trial the finding of the District Court was the same.[20] On the third appeal,[21] the Court of Appeals reviewed the evidence on tenure and concluded (SR 372)—

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[18]"It is true that [respondent's] tenancy was legally subject to termination by . . . the town on thirty days' written notice . . . Doubtless the town had the power to demand the removal of [respondent's] structures upon legal notice . . . He had a right of possession . . . until the expiration of the period after legal notice to terminate the tenancy." Opinion, District Court, 5 FS 435, 438.

[19]"Without question the intention appears that the rents should not be paid any longer than the town should permit the occupants to remain upon the land . . . No scintilla of evidence . . . gave indication of the existence of any express agreement of lease to [respondent] or any of his predecessors." Opinion, Court of Appeals, 77 F2 157, 158.

[20]Memorandum opinion of the District Court (SR 60); and Findings (SR 79).

[21]The second appeal (93 F2 143) involved only matters of pleading.

> "Here, through the monthly payment and acceptance of rent, a month-to-month tenancy existed."

These repeated decisions must establish beyond all doubt that the evidence on tenure (all of which is a part of the record on this appeal) reasonably justifies an inference that respondent did *not* have what he represented, namely, tenure for the life of his improvements. The validity of this factual inference, *qua* inference, cannot be affected by the question of which party has the burden of proof.

To establish that respondent did *not* have a tenure for the life of the building is to prove a negative proposition which, obviously, must rest on inference. The only way to prove what respondent did *not* have in the way of tenure, is to offer such a complete and detailed picture of the factual circumstances under which he and his predecessors acquired and held the property that from them the trier of facts would be led to infer the negative proposition.[22] This, petitioner did.

The Court of Appeals says that a finding based upon documentary evidence "does not command the strong presumption of verity which usually attends a finding" (R 237). Had the appellate Court inferred from the evidence that the representation of a tenure

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[22]On the other hand, respondent's rebuttal offers no such difficulty. His proposition is affirmative, and his relation to the property such as to make the true facts more readily accessible. (*United States v. Denver & R. G. R. Co.*, 191 US 84, 91-2, 24 SCt 33, 48 LEd 106, 109.)

for life of the improvements was true instead of false, it might have been acting within accepted limitations of review.[23]

But the opinion does not suggest that the evidence would support such an inference. To the contrary, it says in effect (R 237) that the appellate Court is unable to determine from the record whether the trial Court was right or wrong in its finding that the representation was false.

In rejecting the finding on this basis, we submit that the Court of Appeals clearly exceeded its powers of review under Rule 52(a), and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

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2. THE STATUS ON APPEAL OF FINDINGS OF FACT IS AN UNSETTLED QUESTION.

Rule 52(a) FRCP, that findings of fact "shall not be set aside unless clearly erroneous . . .", has not been interpreted by the Supreme Court. The Courts of

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[23]But, see 3 *Ohlinger's Federal Practice* 658 (Rule 52, Note 2.1.4):

> "The rule . . . that a reviewing court cannot give to a finding based on exhibits 'the weight that attaches to a finding of fact where the court has heard witnesses in open court, but must draw its own deductions and conclusions from an examination of the exhibits', and the rule . . . that there is no presumption in favor of the correctness of a conclusion from admitted facts, are definitely superseded [by Rule 52(a), FRCP]."

Appeals of the several Circuits have been and are now at variance on the proper interpretation.[24]

A majority of the Circuits have ruled that a finding supported by substantial evidence cannot be said to be "clearly erroneous".

Corbett v. Halliwell (CCA 2) 123 F2 331;
Plack v. Baumer (CCA 3) 121 F2 676, 678;
Keystone etc. Lines v. Brannon-Signaigo C. Co. (CCA 5) 115 F2 736, 739;
Andrew Jergens Co. v. Conner (CCA 6) 125 F2 686, 689;
Apex Elec. Mfg. Co. v. Maytag Co. (CCA 7) 122 F2 182, 189;
E. Albrecht & Son v. Landy (CCA 8) 114 F2 202, 205;
Dye v. United States (CCA 10) 123 F2 385, 386.

On the other hand, the First Circuit interprets the Rule differently.

Fleming v. Palmer (CCA 1) 123 F2 749, 751:

"A finding of fact is clearly erroneous if it is against the clear weight of the evidence. It does not suffice that it be supported by evidence."

United States v. State Street Trust Co. (CCA 1) 124 F2 948, 950.

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[24] 2 *Fed. Rules Service* 672 (Commentary, "Scope of Review of Findings"):

"The decisions under Rule 52 follow no definite trend."

And, as to possible ambiguity in the Rule, see
Ilsen & Hone, 24 Minn. Law Rev. 1, 2 Fed. Rules Service 720, 736-7.

And the instant decision of the Ninth Circuit is the result, in effect, of a trial *de novo* on appeal. The Court of Appeals has here indulged in a complete reweighing of the evidence; has rejected the conclusions reached by the trial Court on the credibility of witnesses, on the resolution of evidentiary conflicts, and on the factual inferences to be drawn from documentary evidence.[25] This practice is wholly out of harmony with the great weight of federal authority, and with the spirit (if not the letter) of Rule 52(a).

Wherefore, it is respectfully urged that this petition for a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit be granted.

Dated, San Francisco, California,
April 24, 1942.

ROYAL INSURANCE COMPANY, LTD.,
Petitioner,

By PERCY V. LONG,
Attorney for Petitioner.

LONG & LEVIT,
BERT W. LEVIT,
WILLIAM H. LEVIT,
Of Counsel.

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[25]This is not the first time that the Ninth Circuit Court of Appeals has so interpreted the scope of review under Rule 52(a). Haney, J., stated in a concurring opinion in *Occidental Life Ins. Co. v. Thomas* (CCA 9) 107 F2 876, 879:

"I believe that the conclusion of the majority is reached by weighing the evidence, and doubt that we have any such power . . ."

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1941

No.

ROYAL INSURANCE COMPANY, LTD. (a Corporation),
Petitioner,

vs.

ROBERT A. SMITH,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF CASE.

The insurance contract in suit covers on respondent's "leasehold interest", and is expressly predicated upon a "lease to land".

The house had been built by one Keil about 1890 (SR 118), on beach property then owned by Belvedere Land Company (SR 117). In 1896 the Land Company deeded the beach property to the newly incorporated town of Belvedere in trust for perpetual use

as a public beach; the deed (SR 17)[1] provides that the Keil house shall not "be renewed in case of destruction by fire or otherwise", and that it shall be permitted to remain on the beach property "as long, and subject to such conditions as shall be determined by said town".

In 1910 Keil deeded the house to his sister-in-law, Mrs. Bland (SR 120, 150-1); she died in 1926, and title passed to Crocker First Federal Trust Company as executor and testamentary trustee (SR 158). The Trust Company sold the house in 1928 to respondent (SR 121-2, 212), who occupied it until its destruction by fire in 1932. From 1893 (SR 125) until the fire, respondent and each of his predecessors in interest paid three dollars monthly "ground rent" for the use of the land on which the house stood.

Respondent paid the Trust Company $6000 for the house and "whatever right" of occupancy existed (SR 275-6). He made extensive physical improvements, and when the house burned in 1932 it had a value of $17,985.[2]

In respondent's original complaint herein it is alleged that his "leasehold interest" arose from the provisions of the 1896 deed by which the town acquired the property. Judgment at the first trial for respondent was reversed on appeal (77 F2 157) on the

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[1]The deed is analyzed in the first opinion of the Circuit Court of Appeals herein, 77 F2 157.

[2]This amount, as well as the full value of the contents of the house, was covered by fire insurance policies written by petitioner and other insurers, and was paid to respondent by them (SR 265).

ground that the complaint did not state a cause of action, since "no interest subsisted in plaintiff by the terms of the deed alone" (p. 159).

Respondent then amended to allege a different basis for his "leasehold interest". He alleged[3] that the Belvedere Land Company, before deeding the property to the town, entered into a written agreement with Keil—

> "to allow him, as its lessee, to maintain the improvements upon the real property in consideration of the payment of $3 per month . . ., Keil to have the exclusive possession and use of the ground until such time as the improvements should be destroyed by fire, or otherwise."
> (93 F2, 144.)

The town, it was alleged, took with knowledge of Keil's lease, and its title was subject thereto; and Keil's leasehold rights passed, successively, from Keil to Bland to Bland's estate to respondent.

The complaint also alleged that when respondent applied to petitioner for a policy insuring against the loss of his tenure, he "fully advised" petitioner of all the pleaded facts concerning this lease.

The Court of Appeals held that this complaint stated a cause of action, and that respondent was "entitled to an opportunity to make his proof" (93 F2, 146).

At the second trial respondent was wholly unable to prove the existence of the pleaded (or any) lease for a term commensurate with the life of his building. The

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[3]These allegations are summarized in the second opinion of the Court of Appeals, 93 F2 143, 144.

District Court gave judgment for petitioner (SR 60, 93).

On appeal the judgment was reversed. The Court of Appeals pointed out that the evidence established the existence of a month-to-month tenancy in respondent (SR 372), and held that this was a "lease" and "leasehold interest" within the meaning of those terms in the policy (SR 373). It was recognized in the opinion that this month-to-month tenancy was not the pleaded leasehold interest "for a term running at all events until the destruction of his buildings" (SR 374), and respondent was given leave "to amend his complaint in conformity with his proof" of a month-to-month tenancy.

Respondent then filed his fourth amended complaint (R 1), in which he shifted to still a third basis on which to rest his "leasehold interest". In this pleading all pretense that respondent had more than a month-to-month tenancy is abandoned, and all allegations relating to a lease between Keil and the town's grantor are omitted.

Petitioner's answer (R 13) pleads, by way of affirmative defense, that respondent procured the policy in suit by falsely representing to petitioner that he held a lease to the beach property for a term running to, and not expiring until, the destruction of his building (R 59-62).

It was stipulated (R 58) that the entire record of the second trial[4] was to be deemed in evidence as a part of the record of the third trial.

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[4]Supplemental Transcript of Record herein.

The trial Court (R 25) gave judgment (R 41) for petitioner, on findings (R 31) sustaining the affirmative defenses of misrepresentation, mutual assumption proving false, and rescission.

These findings of fact were rejected by the Court of Appeals, which reversed the judgment and ordered the District Court to enter final judgment for respondent (R 232, 237; 125 F2 222). Petition for rehearing was denied (R 239).

ERRORS TO BE URGED.

1. The Court of Appeals erred in construing the words "lease" and "leasehold" in the policy to comprehend a month-to-month tenancy.

2. The Court of Appeals exceeded limitations of appellate review prescribed by Rule 52(a), FRCP, in rejecting *in toto* the trial Court's findings of fact on the affirmative defenses, reversing judgment for petitioner, and ordering that final judgment be entered for respondent on the strength of its own (implied) contrary factual findings.

ARGUMENT.

I.

MEANING OF "LEASE" AND "LEASEHOLD INTEREST".

SUMMARY: A MONTH-TO-MONTH TENANCY IS NOT A "LEASE" OR "LEASEHOLD INTEREST" WITHIN THE MEANING OF THOSE TERMS IN THE CONTRACT OF INSURANCE. THE COURT OF APPEALS ERRED IN APPLYING TO THESE TERMS A TECHNICAL DEFINITION FROM THE LAW OF LANDLORD AND TENANT, AND REJECTING THE PLAIN MEANING ACCEPTED BY ORDINARY USAGE.

1. Standard of interpretation.

Insurance contracts, like other contracts, are to be interpreted according to the ordinary and popular sense of the words used, rather than according to their strict legal meaning.

California Civil Code, Section 1644;

Bastian v. British Amer. Assur. Co., 143 Cal. 287, 77 P 63;

Aschenbrenner v. United States Fidelity & G. Co., 292 US 80, 54 SCt 590, 78 LEd 1137;

1 *Restatement of Contracts* 319, Section 235(a).

2. Authorities relied on by Court of Appeals.

The opinion of the Court of Appeals adopts a strictly technical definition of the words "lease" and "leasehold", taken from the law of landlord and tenant.[5] This definition, according to the quotations found in the opinion (SR 373), embraces a tenancy from month-to-month and a tenancy at will.

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[5]This refers to the third opinion of the Court of Appeals (SR 366, 373-4); it established this construction of the policy as the law of the case, so that it was no longer an open question on the last trial or appeal.

It is undisputed that the holding was purely a matter of definition, as the record is wholly devoid of any intimation that the parties used the words in any special sense. The only tenure discussed by the parties was one for a term not expiring until the building was destroyed. Certainly, there was no mention of a month-to-month tenancy.

Without exception, each of the cases quoted from or cited in the opinion (SR 373-4) involved a written lease specifying a fixed term of occupancy.

The first quotation (SR 373) is from *Bouvier,* as quoted in *Walls v. Preston,* 25 Cal. 59. But, *Bouvier's Law Dictionary* (Rawle's 3d Rev.) defines "leasehold" as follows:

> "The estate held by virtue of a lease. *In practice the word is generally applied to an estate for a fixed term of years.*"

The second quotation (SR 373) is from *Ruling Case Law,* as quoted in *Stone v. Los Angeles,* 114 Cal. App. 192, 299 P 838. But, in the very same section of that work (16 RCL 531) the text continues:

> ". . . *As ordinarily employed,* the word lease implies a term . . . The term *'tenant'* is, however, sometimes used in a *broader sense* so as to include 'one who holds or possesses lands or tenements by any kind of title, either in fee, for life, years or at will.' "

3. **Correct meaning of the policy.**

The words "lease" and "leasehold" are common to ordinary usage in the daily affairs of mankind. They

have acquired a fixed and definite meaning,—an accepted significance.[6]

Jamaica Pond Aqueduct Corp. v. Chandler, 91 Mass. 159, 167:

> "Undoubtedly the word 'lease', *as ordinarily interpreted and understood,* . . . denotes the creation of an estate for years commonly called a term."

Mayberry v. Johnson, 15 N. J. L. 116, 121:

> ". . . *In common parlance,* where it is said a man has a lease for property, nothing more is meant, than that he has a term, or an estate for years in the premises . . ."

See also, *Koehler v. Dennison* (Ore.) 143 P 649, where the Court definitely rejected the contention that a month-to-month tenancy was a lease within the ordinary usage of that term.

Raynolds v. Hanna (C.C., N.D. Ohio, E.D.) 55 F 783, 800:

> "In the present case the term (of the lease) is sufficiently definite . . . It is to continue so long as there is coal that can be 'practicably mined'. This constitutes a 'determinate period'."[7]

Abbott's Law Dictionary:

> "Leasehold. Any interest in land less than freehold *might* be so called; *but, in practice, the*

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[6]The meaning of English words and phrases is within the judicial knowledge of the Court.

Nix v. Hedden, 149 US 304, 13 SCt 881, 37 LEd 745.

[7]This is precisely the kind of lease that the parties had in contemplation in the case at bar.

word is generally applied to an estate for a fixed term of years."

Anderson's Law Dictionary:

"Leasehold. An estate in land *for a fixed term of years."*

Byrne's Law Dictionary:

"Lease. A lease is in effect a conveyance or grant of the possession of property (generally but not necessarily land or buildings) to last during the life of a person, or for a term of years or other fixed period, or at will, and usually with the reservation of a rent. Leases for a life or lives are comparatively rare, *and when a lease is spoken of, prima facie a lease for years is meant.*

Leaseholds are lands held under a lease for years."

Murray's New English Dictionary:

"Lease. 1. A contract between parties, by which the one conveys lands or tenements to the other for life, for years, or at will, usually in consideration of rent or other periodical compensation. . . .

The grantor of a lease is called the lessor, and the grantee, the lessee. *In popular language, lease is usually confined to a conveyance by deed for a term of years."*

Funk & Wagnall's New Standard Dictionary:

"Lease. 1. A contract for the possession and profits of lands *for a determinate period,* less than the time for which the lessor holds the same, in consideration of a recompense of rent . . .

Leasehold. An interest in lands held as a dependent tenure by virtue of a lease *for a term.*"

March's Thesaurus Dictionary:

"Lease. A contract for the possession and profits of lands, etc., *for a determinate period;* the document for this."

Oxford Dictionary:

"Lease. a. A contract between parties, by which the one conveys land or tenements to the other for life, for years, or at will . . . *In popular language* lease is usually confined to a conveyance by deed for a term of years."

New International Encyclopedia (2d Ed.), vol. XIII, pp. 678-9:

"Lease. The act or instrument whereby any estate in land less than a fee is created. In its most extended sense the term thus includes the conveyance of a life estate as well as the agreement which results in a tenancy for years, at will, or from year to year. *More frequently, however, it is applied* to the writing (not usually a deed) or the parol declaration creating an estate for years, or leasehold, as it is technically called."

Pitman's Commercial Encyclopedia, vol. 3, p. 911:

"Leaseholds. Land held for a fixed term certain, as for a definite number of years, is known as a leasehold."

Schneider, California Real Estate Principles and Practices:

"Estates for years. This is the estate *quite generally* designated as a lease." (Ch. III, p. 15.)

"Regardless of the length of the term, the right of the tenant to use the leased premises is personal property, and his holding under a lease *for a definite or determinate term* is called a leasehold." (Ch. XXIII, p. 440.)

3 *Thompson on Real Property* (Perm. Ed.) 132, Section 1100:

"Definition and nature of lease . . . *'But in common parlance,* where it is said a man has a lease of property, nothing more is meant than that he has a term or estate for years in the premises . . .'"

II.

SCOPE OF REVIEW OF TRIAL COURT'S FINDINGS OF FACT.

SUMMARY: THE SCOPE OF REVIEW PRESCRIBED BY RULE 52(a), FRCP, DOES NOT CONTEMPLATE THAT DETAILED FINDINGS OF FACT SHALL BE SET ASIDE ON APPEAL AS "CLEARLY ERRONEOUS" WHEN THEY ARE SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD; WHEN CONFLICTING EVIDENCE OR THE CREDIBILITY OF WITNESSES IS INVOLVED; OR WHEN THE EVIDENCE, THOUGH WITHOUT MATERIAL CONFLICT, IS SUBJECT TO DIVERGENT INTERPRETATIONS.

1. Substantial supporting evidence.

Under modern equity practice[8], findings of fact will not be disturbed on appeal if supported by substantial evidence.

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[8]Advisory Committee's Note to Rule 52, FRCP:

"The rule stated in the third sentence of Subdivision (a) accords with the decisions on the scope of the review in modern federal equity practice."

Great Atl. & Pac. Tea Co. v. Grosjean, 301 US 412, 420, 57 SCt 772, 81 LEd 1193, 1198, 112 ALR 293, 297:

> "These findings [of the trial court] are assigned as error, but they have substantial support in the record and we therefore accept them."

Borden's Farm Products Co. v. Ten Eyck, 297 US 251, 261, 56 SCt 453, 80 LEd 669, 673:

> "The appellant assigns [findings of the master and the trial court] as error; but they are supported by substantial evidence and we will not disturb them."

Adamson v. Gilliland, 242 US 350, 353, 37 SCt 169, 61 LEd 356, 357-8.

And this has been the interpretation attached to Rule 52(a), FRCP, by most of the Circuits.[9]

Floridin Co. v. Attapulgus Clay Co. (CCA 3) 125 F2 669, 670:

> "This finding [of fact by the trial court] is supported by substantial evidence and is thus controlling here on appeal. (Citing Rule 52)"

2. Credibility of witnesses.

Webb v. Frisch (CCA 7) 111 F2 887, 888:

> "We do not understand that the foregoing rule [52(a)] has enlarged the discretion of this Court in passing upon the probative force of evidence. Our function is to review the finding of the lower court and not to pass upon the evidence de novo. We cannot say that a finding of the fact of prior

[9]See, cases from the several Circuits cited in the accompanying Petition.

use is 'clearly erroneous' merely because we might have entertained some doubt about the quantum of evidence. We must attach to the testimony of witnesses the full weight and quality of credibility which the trial court gave it."

3. Factual inferences from unconflicting evidence.

18 *Hughes Fed. Practice* 348, Section 24551:

"The rule (52) applies whether there is a conflict in the evidence *or whether there is a difference of opinion as to the inferences that may be drawn from undisputed evidence.* The Advisory Committee notes to the rule make that clear."

Holtzoff, New Fed. Procedure and the Courts, pp. 132-3:

"In view of the above mentioned restriction [of Rule 52(a)] on the scope of appellate review of the findings of a trial court, the results reached should not be set aside by the Circuit Court of Appeals in a case in which the evidence is conflicting and one of the elements involved was the credibility of witnesses. *This is likewise true, if . . . the evidence is without material conflict but subject to divergent interpretations."*

3 *Ohlinger's Fed. Practice* 658 (Rule 52, Note 2.1.4):

"Findings of fact from exhibits and conclusions from admitted facts are subject to the rule that 'findings of fact shall not be set aside unless clearly erroneous'."

The Court of Appeals has, we submit, exercised herein a scope of review over findings of fact made by the trial Court which is at variance with each of the principles stated in the foregoing paragraphs. In so doing, the Court of Appeals departed widely from accepted and usual appellate practice and from the provisions of Rule 52(a), FRCP.

The proper interpretation of the third sentence of Rule 52(a) presents an important question of federal law; and the existing doubt, resulting from conflicting decisions in the Circuits, should be removed by the Supreme Court.

Dated, San Francisco, California,
April 24, 1942.

Respectfully submitted,
PERCY V. LONG,
Attorney for Petitioner.

LONG & LEVIT,
BERT W. LEVIT,
WILLIAM H. LEVIT,
Of Counsel.

(2)

FILED
MAY 21 1942
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1941

No. 1181

ROYAL INSURANCE COMPANY, LTD.
(a corporation),
Petitioner,

vs.

ROBERT A. SMITH,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

As initially stated in the Circuit Court opinion herein, Smith v. Royal Insurance Co., Ltd. (No. 9202), 111 Fed. (2d) 667 *at* 668—"The suit is on a valued policy of fire insurance upon a leasehold interest of appellant in property located in Belvedere, California."

Any implication that the cause of action was ever changed by any amended pleading is untrue and misleading. That proposition was set at rest by the Cir-

cuit Court on the second appeal (No. 8474), 93 Fed. (2d) 143 *at* 146:

> "However, appellant has but one cause of action. He is suing on one policy of insurance, not on several policies, and he is not asking for reformation."

The facts on the case in chief are substantially and fully stated in the third Circuit Court opinion, 111 Fed. (2d) 667 *at* 668, et seq. The terms of the policy are *there* set forth *in haec verba* and the applicable facts detailed—after which the Court concludes, page 670:

> "During the whole period of nearly half a century, appellant and his predecessors in interest had exclusive possession of the tract against all the world, including the owner. Their possession was lawful and their exclusive occupancy was accompanied by the regular payment of rent. The question here concerns the nature of their tenure—*whether it was a leasehold interest or a mere license.*"[1]

There were four trials of this cause in the District Court to which the cause was moved after having been filed in the Superior Court of the State of California on December 8, 1932. Each trial resulted in an appeal to the Circuit Court of Appeals for the Ninth Circuit: and each of the resulting judgments was reversed by the Circuit Court.

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[1]The question put in italics (supplied throughout) was and remained the sole issue of law and fact upon the first, second and third trial. Upon those trials, the affirmative defenses were not involved.

STATEMENT OF THE CASE.

The first appeal.

The first trial resulted in a judgment in favor of this respondent. (5 Fed. Supp. 435.) Your petitioner, the insurance company, which designation will hereafter be employed in the interest of clarity, appealed. That appeal resulted in a reversal, the Circuit Court holding, 77 Fed. (2d) 157, that the demurrer to the complaint should have been sustained because the pleading did not state a cause of action, in that no insurable interest was in fact alleged thereby. The insurance company had assigned as errors—*first,* the overruling of its demurrer, and second, the failure to allege and prove an insurable interest. That opinion concludes:

> "* * * The *complaint,* owing to its adherence to the proposition that the deed above mentioned is in and of itself sufficient to show an interest of plaintiff in the land, will not support a judgment, although its terms might, upon trial, be some evidence of the intention of the Belvedere Land Company.
>
> However, since the insurance company has not had an opportunity to meet and defend against any other theory of liability, the cause must be sent back for retrial. The demurrer to the complaint should have been sustained with leave to the plaintiff to amend, if so advised."

The second appeal.

Your respondent, accordingly, amended his complaint setting forth, because of the obscurely stated and incomprehensible law of the case, all of the known

facts and circumstances surrounding this ancient tenure.[2] The District Court sustained a demurrer thereto without leave to amend upon the theory that the law of the first appeal was fatal to the complaint as amended.

From the judgment entered thereon, your respondent appealed. The Circuit Court reversed the judgment, 93 Fed. (2d) 143 *at* 146, with the statement:

> "The judgment is reversed, with directions to overrule the demurrer and permit the appellee (the insurance company) to answer."

The third appeal.

Thereafter, the insurance company filed its answer to the amended complaint and a trial thereof to the same District Court resulted in a judgment for the insurance company—from which your respondent again appealed. Upon that appeal, the insurance company urged that there was a failure to prove the existence of an insurable interest and that *in any event* there was a failure to prove the insurable interest described in the policy.

The Circuit Court (No. 9202) (111 Fed. (2d) 667) determined, (a) that your respondent's interest in the land was not a mere license but a leasehold in-

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[2] *Smith v. Royal Insurance Co.*, 93 Fed. (2d) 143 at 145 (second appeal), states: "The third amended complaint contains numerous unnecessary averments and much evidentiary matter, and is not to be commended as a model pleading. But the essential facts pleaded are clear enough and we find no substantial uncertainty in them. The difficulty lies in the attempt to define appellant's interest. The uncertainty is one of law rather than of fact, and in the resolution of the problem we have had no help from counsel for appellee. * * *"

terest "terminable on the happening of the contingency insured against, and the contingency occurred"; (b) that "to bring himself within the provisions of the policy, appellant need establish no more than an insurable interest in the nature of a leasehold. This he did." and (c) that the first opinion—i.e., 77 Fed. (2d) 157—"as not accurately reflecting the applicable law, the court's intimation there concerning the necessity of appellant's (your respondent) proving an express lease" be and was disapproved. (111 Fed. (2d) *at* p. 670.[3]

The third C. C. opinion, taking cognizance of the fact that the insurance company had always theretofore answered setting up the affirmative defenses of fraud and mistake but that it *had withdrawn its affirmative defenses at all previous trials,*[4] concluded as follows:

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[3]Upon the third appeal and trial, apparently reconciling itself to the possible existence of an insurable interest in plaintiff, the insurance company sought to secure a policy interpretation to the effect that the policy required proof of a lease terminable *in no event* until the destruction of the buildings by fire or otherwise.

Then, on that interpretation, it argued a failure on the part of the plaintiff to prove such tenure—this in the absence of any reformation.

As to the necessity of pleading or proving a tenure terminable only upon the destruction of the building, the Circuit Court said, 111 Fed. (2d) *at* p. 671: "The insurance contract does not so provide; and such is not the law of the case."

[4]It is to be noted here that at the first and third trials, which were upon the facts and the law—the second trial being only upon the issue raised by demurrer—the insurance company pleaded certain affirmative defenses—i.e., mistake and misrepresentation or fraud. But at those trials, the insurance company had withdrawn its affirmative defenses and hence they were only placed in issue upon the fourth trial. (R. 58 et seq.)

> "Appellant (your respondent) may amend his complaint in conformity with his proof, and appellee (your petitioner) may amend its answer if it so desires. On another trial, appellee will have the opportunity of proving such affirmative defenses *as may be available to it.* Reversed." (111 Fed. (2d) 667 *at* 671.)

The fourth and last appeal.

Accordingly, your respondent amended his complaint alieging that he was possessed of the insurable interest described in the policy. (R. 1 et seq.) The insurance company answered and, *inter alia* again set up its affirmative defenses. (R. 16 et seq.)

The cause went into its last trial on the following two affirmative defenses: (1) That the policy was written upon the innocent misrepresentation by the insured that his tenure "ran to and until the destruction of the buildings" (R. 59), and (2) that the policy was written under the mutually mistaken belief that the tenure was for a term "running to and not expiring until the destruction of the building by fire or other casualty". (R. 62.)

The same trial Court (R. 31 et seq.) found for the insurance company, upon both the mistake and the "innocent fraud". From the judgment entered thereon, your respondent appealed (No. 9850), and upon that appeal your respondent urged: (1) that *no evidence* was adduced or attempted showing or tending to show that the mistaken belief or representation *was in fact false;* (2) that moreover, the alleged representation was, as a matter of law, merely

a statement of one's own judgment or belief (Cal. Ins. Code, §§339, 337, 354); (3) that it was not material nor was there evidence that it in fact induced the contract.[5]

The Circuit Court (No. 9850), 125 Fed. (2d) 222, rendered the opinion which is attacked herein—remanding "with directions to enter judgment for appellant". The holding was that for the reasons urged by your respondent the findings of the trial Court were "clearly erroneous".[6]

The insurance company now urges herein that the Circuit Court erred first in its construction of the insurance contract, and second in its construction of Rule 52 (a), F. R. C. P.

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[5]In this respect, counsel for the insurance company admitted or stipulated as follows (S. R. 101):

> "We also admit that prior to the issuance of said policy, *both plaintiff and defendant were in doubt* as to the proper designation of said interest; that it was the defendant *and not the plaintiff* who described the interest of the assured as set forth (in the policy) * * *."

This alone is sufficient to charge the representation as admittedly being one known to be a statement of belief or judgment or of one's "own judgment upon the matters in question".

[6]The Court pertinently observed—"Appellee has not sought or obtained reformation of the policy, and it strenuously denies that this is a case for reformation. It says the insurance contract, as drafted, 'is the exact contract that the parties intended to make' * * *."

This is pertinent because if the policy had been reformed to cover a tenure terminable only upon the destruction of the buildings by fire, the burden would have been upon the insured to prove such a tenure. But in the absence of reformation, *and in the face of its charge of fraud*, the burden was upon the insurance company to prove that this insured's tenure was in fact not one running for the life of the buildings.

POINTS AND AUTHORITIES.

I.

THE PETITION PRESENTS NO LEGAL BASIS FOR CERTIORARI UPON THE GROUND THAT THE CIRCUIT COURT MISINTERPRETED THE TERMS OF THE POLICY.

The terms employed by the policy—i.e., "lease" and "leasehold interest"—were construed by the Circuit Court upon the *third* appeal (No. 9202) (111 Fed. (2d) 667). The subsequent and *fourth* opinion, 125 Fed. (2d) 222, which is the subject of this proceeding, *involves no questions of construction.*

Patently the gravamen of petitioner's complaint in this respect is that the Circuit Court, *upon a prior hearing,* should have reformed or construed the policy as insuring a tenure terminable only upon the destruction of the building—and consequentially as placing the burden of proof of the existence of such a tenure upon the insured.

But by its prior opinion, 111 Fed. (2d) 667 *at* 671, the Circuit Court definitely set at rest any question upon that contention, concluding: "The insurance contract does not so provide; and such is not the law of the case."

At the last trial, which resulted in the *fourth* opinion (125 Fed. (2d) 222), now directly attacked by the present petition, the issues made were *solely upon the affirmative defenses* of the insurance company.

The company charged fraud, actual or constructive, not as a basis for reformation of the policy but in avoidance thereof—thereby assuming the burden

of proof upon the falsity of the alleged representation.[7]

As counsel admits in the opening page of his present petition, a petition for writ of certiorari in connection with the prior appeal, which alone involved the question of the interpretation or construction of the policy was made and denied by this Court. (October Term, 1940, No. 307.)

(1) Under these circumstances there is, therefore, grave doubt as to whether any question as to the construction of the policy arises *on this record*—if not, the point on construction may not here be made the basis of a writ. (*Tyrrell v. Dist. of Col.*, 243 U. S. 1, 61 L. Ed. 557; *Furness etc. Co. v. Wang-Tsze Ins. Assn.*, 242 U. S. 430, 61 L. Ed. 409.)

(2) The ground under discussion does not fall within the letter or spirit of subs. (a), (b) or (c) of Section 5 of Rule 38 of the Revised Rules of the Supreme Court. The issue revolves entirely upon well settled local or state laws, and the cause grows out of a California contract.[8]

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[7]Upon the issue of falsity, the insurance company adduced not one scintilla of evidence. It in fact made no attempt to introduce evidence of the falsity of the alleged misrepresentation or belief.

[8]Upon the question of construction of an insurance policy, the law in California is well settled. In *Fageol T. & C. Co. v. Pac. Indemnity Co.* (1941), 18 Cal. (2d) 731 *at* 747, 117 Pac. (2d) 661, it is stated:

> "But if there be any ambiguity in the Detroit policy, it must be resolved against the insurer. (32 C. J. 1152, sec. 265.) If to give the quoted clause the meaning contended for would release Detroit from liability, then it must be construed so as to permit recovery since it is 'susceptible of such construction'. Where two interpretations equally fair may be made, that which affords the greatest measure of protection to the assured will prevail. (32 C. J. 1155, sec. 265; Hartford Steam Boiler etc. Co. v. Cochran Oil Mill etc. Co., 26 Ga. App. 288, 105 S. E. 856, 859.)"

Upon a question controlled by state or local law, even actual or probable conflict among the circuits is not of itself a reason for granting the writ. Nor should this Court be asked merely to review the evidence or inferences drawn from it in connection with the construction of the language of the policy. (*Rhulin v. N. Y. Life Ins. Co.,* 304 U. S. 202, 58 S. Ct. 860, 82 L. Ed. 1290.)

(3) Moreover, the statement of the Circuit Court contained in its third opinion—"The definition of these terms (lease and leasehold interest) appears to embrace, in effect, any agreement whether express or implied which gives rise to the relationship of landlord and tenant"—not only finds abundant and authoritative support in the opinion itself but is, without question, the definition accepted in California and elsewhere. (15 *Cal. Jur.* 598; *Beckett v. City of Paris,* 14 Cal. (2d) 633 at 636, 96 Pac. (2d) 122; *Dean v. Brower,* 119 Cal. App. 412 *at* 415, 6 Pac. (2d) 580; *Stone v. L. A.,* 114 Cal. App. 192, 229 Pac. 838; *Shaw v. Caldwell,* 16 Cal. App. 1 *at* 7, 115 Pac. 941.)

Without analyzing at length the numerous definitions of "lease" and "leasehold" set out by petitioner in its brief (7-11), it may be observed in conclusion that a complete perusal of its references compels the conclusion that wherever the relation of landlord and tenant obtains a lease or leasehold interest exists—*and this irrespective of the length of the term.*

II.

THE PETITION PRESENTS NO LEGAL BASIS FOR CERTIORARI UPON THE GROUND THAT THE DISTRICT COURT FINDINGS WERE NOT "CLEARLY ERRONEOUS", OR THAT THE CIRCUIT COURT VIOLATED RULE 52(a) F. R. C. P.

The applicable portion of the rule referred to reads as follows:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Upon the last trial (Fourth Appeal No. 9850), the insurance company urged two contradictory and incompatible affirmative defenses—(a) that plaintiff's broker falsely, but innocently, represented that the tenure ran for the life of the building; and (b) that the policy was written under the mutually mistaken belief that the tenure ran for the life of the building. (R. 59 et seq.)

The mutual mistake defense may be passed because

> "*Without reformation,* an insurer cannot, in an action at law, avail itself of the affirmative defense of mutual mistake in the execution of a contract." (8 Couch on Insurance 7018, §2168.)

Coming, then, to the fraud, actual or constructive, your respondent urged upon the last appeal, *inter alia,* a failure to prove falsity, materiality or reliance, etc. (R. 222.)

Upon the trial of the affirmative issues (C. C. No. 9850) the insurance company *introduced no exhibits* and called *but one* witness who had any knowledge

of the transaction, Mr. Evans, one of its officers. (R. 88-118.) This witness admittedly had neither knowledge of the falsity nor of the truth of the representation. He was not interrogated upon the issue of FALSITY.

Admittedly, then, the record on the last appeal (No. 9850) contains not one item of evidence showing or tending to show, or addressed to the proof of, the falsity of either the belief or of the representation.[9]

Upon that record, the finding of "falsity" is "clearly erroneous". The judging of the credibility of witnesses and the weighing of the conflicting evidence are matters entirely extraneous to that record.

The supplemental record (No. 9202—S. R. herein).

The second and last error urged by the petitioner is, therefore, necessarily untenable—unless the Supplemental Record contains substantial evidence which may *in law and fact* form the basis of the trial Court's "independent appraisal" in making its finding of *falsity*.

But the issue of "falsity" is foreign to the Supplemental Record. Neither the representation nor its falsity were in issue at this previous trial. (S. R. 338.)

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[9]Upon what, then, did the trial Court base the "clearly erroneous" finding of falsity? The Circuit Court (125 Fed. (2d) 222 at 224) has the answer:

> "It is to be gathered that the court regarded our decision on the *last appeal* as holding that a tenure of no higher dignity than one from month to month had been established. *The opinion cannot fairly be so construed.* The only question then before us was whether the evidence disclosed any insurable interest in the nature of a leasehold. *We were not called upon to decide, and did not decide, whether such estate as appellant had was terminable short of the destruction of his dwellings.* * * *" (Italics ours.)

Moreover, at that trial, the insurance company called *no* witnesses—adduced no testimony whatsoever. (S. R. VII-VIII.) So there, too, the determination of the credibility of witnesses or conflicting testimony is not involved.[10] Nor has counsel pointed to any conflict of testimony or to any testimony supporting the finding of *falsity*.

The insurance company's sole contribution to the Supplemental Record herein consisted of twenty-eight exhibits (S. R. II, III, IV, "A" to "BB")—all introduced upon the cross-examination of your respondent's witnesses. But not one of these twenty-eight exhibits, the construction of which is, of course, *purely a matter of law*, even bears upon the extent of the tenure or points the falsity of this (then not in issue) representation or belief. The plaintiff introduced thirty-two exhibits. Of the fifty exhibits, not one is inconsistent with the other, nor is any inconsistency pointed.

It will serve no useful purpose to analyze these various exhibits. Nor has petitioner particularly pointed to any thereof as carrying an inference of the falsity of *any* representation. Its counsel does make reference to three thereof—the Preusser letter, the assessment rolls and the Federal estate tax return

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[10]Nor did any of plaintiff's witnesses, of course, give testimony upon the falsity of the representation or from which that falsity could be inferred. Those of these witnesses who had any conviction on the subject, on the contrary, gave testimony which would point the truth of any such representation. (Benson, S. R. 107 et seq.; Estabrook, S. R. 165 et seq.; Hanley, 281 et seq.; Preusser, 149 et seq.; Smith, 202 et seq.)

(pp. 16-17 of petition)—as carrying the inference that no leasehold interest ever existed.[11]

Upon this Supplemental Record the trial Court found that your respondent had neither insurable interest nor any leasehold interest. (S. R. 92.) The Supplemental Record, being entirely free of conflict, it must be assumed that the Trial Court's finding was purely one of law. The inevitable conclusion is that Rule 52 is inapplicable.

The quarrel here is not so much as to the force or dignity of petitioner's authorities but as to their application. In the last analysis, counsel comes to bar admitting "the evidence is without material conflict" and "undisputed" and that no credibility of witnesses, *at least on the issue of falsity,* is involved and that the burden of proving the *falsity* is upon

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[11]The Preusser letter, written November 9, 1927, in an attempt to beat down the price on the property (S. R. 161) proves nothing of the sort claimed. She never owned the property. It is not only rank hearsay on the part of a stranger to the title as to something she could not in the nature of things have had knowledge, but she admitted that she never discussed it with Mr. Keil (S. R. 162), and herself denied the truth of the letter's contents. (S. R. 163.) This hearsay does not even approximate in evidentiary strength the Keil statement to Hanley that he had a tenure for the life of the structures. (S. R. 305 et seq.) Keil, the man who erected the building in 1884, is the person who, at the time of the trial, was incompetent to testify. It was stipulated that he would never again regain competency. (S. R. 337.)

As to the assessment rolls, which did show that the leasehold interest had never been assessed to the plaintiff or his predecessors in title, it must be observed that this *spells nothing as to the length of the tenure,* for by the California law referred to (California Political Code §3820) *any possessory right,* whether lease or license, is taxable.

Nor does the Federal estate tax return made by a trustee for the deceased owner, Mrs. Bland, throw any light upon the length of the tenure *but only upon its existence.*

him. He would then defend the finding of *falsity* as not being "clearly erroneous" upon the sole ground that the trial judge made it—and invoke Rule 52 as prohibiting an Appellate Court from determining whether there is any basis in law or fact for the finding. Carried to its logical conclusion, this would destroy the appellate function.

While it may be true that Rule 52 (a) has not "enlarged the discretion" of an Appellate Court "in passing upon the probative force of evidence", it cannot be said that the rule has shackled that discretion to the end that an Appellate Court may not read and construe exhibits and pass upon "undisputed evidence" or determine whether a litigant has successfully sustained the burden of proof.[12]

It is respectfully submitted that for the foregoing reasons the two errors urged herein are insufficient to warrant the issuance of the writ prayed.

Dated, San Francisco, California,
May 15, 1942.

A. B. BIANCHI,
JAMES M. HANLEY,
Attorneys for Respondent.

[12]The charge made against your respondent, call it by any name, is still fraud, actual or constructive, and the burden of its clear proof is, by every authority, upon the accuser.

Due service and receipt of a copy of the within is hereby admitted

this.....*day of May, 1942.*

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.....

.....

Attorneys for Petitioner.

(3)

FILED
MAY 21 1942
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1941

No. 1181

ROYAL INSURANCE COMPANY, LTD.,
(a corporation),
Petitioner,

vs.

ROBERT A. SMITH,
Respondent.

PETITIONER'S REPLY BRIEF.

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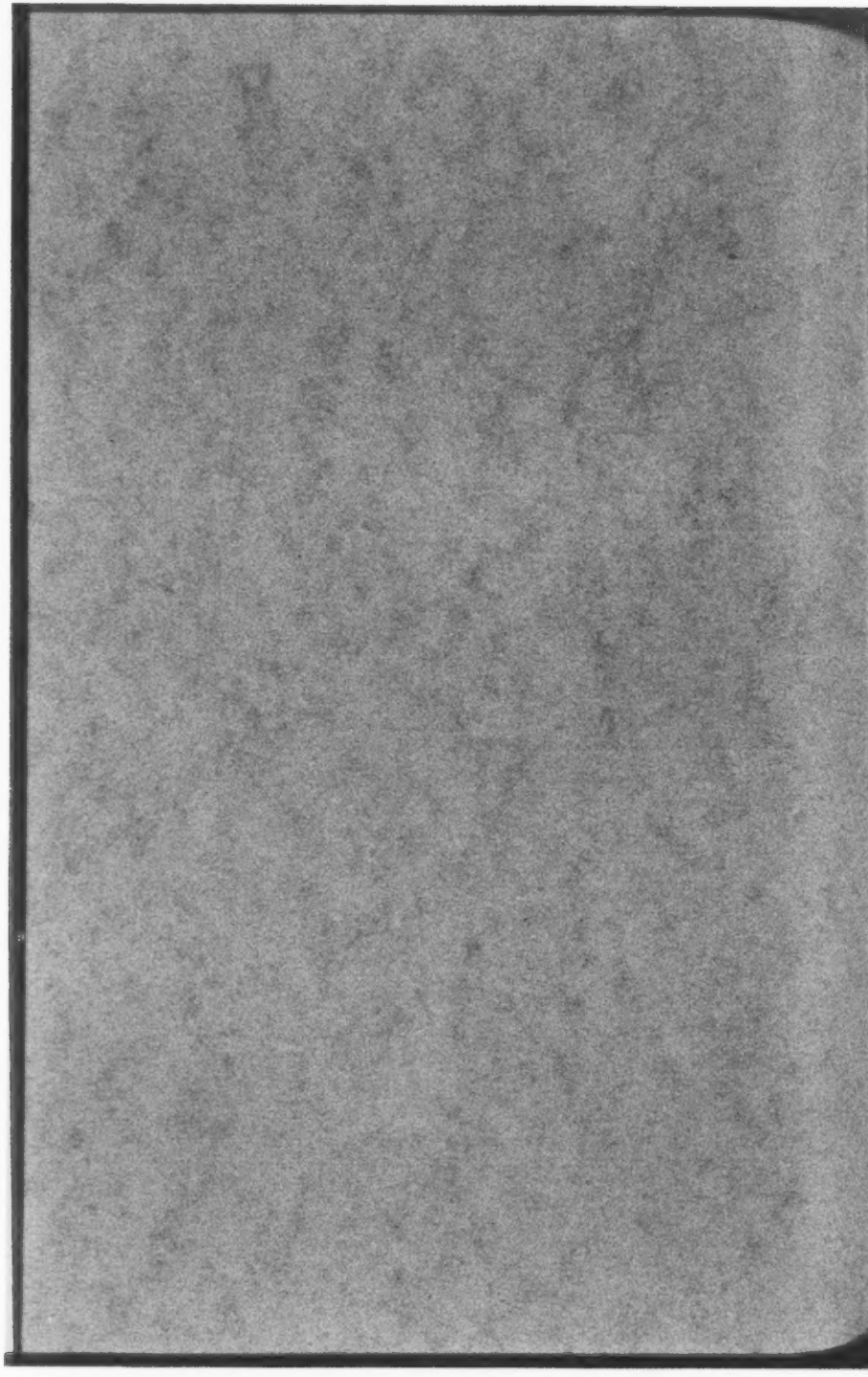

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Respondent.

PETITIONER'S REPLY BRIEF.

I.

Respondent argues (pp. 8-10) that "the petition presents no legal basis for certiorari" with regard to the Court of Appeals' construction of the insuring clause of the policy.

(1) He points out (p. 9) that this construction of the policy was established as the law of the case,[1] not

[1]In his brief (p. 3), respondent refers to what he calls "*the obscurely stated and incomprehensible law of the case*". (Italics ours.)

by the last (fourth) opinion of the Court of Appeals, but by its third opinion; and that our petition for certiorari filed following the third opinion was denied. (Of course, the present petition, pp. 1, 4, discloses these matters.)

From this, respondent insists (p. 9) that there is "grave doubt as to whether any question as to the construction of the policy arises *on this record*". (Italics by respondent.)

This precise contention was made, and rejected, in *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 US 251, 257-9, 36 SCt 269, 60 LEd 629, 633-4:

> "It is contended that this question is settled otherwise, at least as between these parties, by the decision of the circuit court of appeals on the first appeal, and our refusal to review that decision upon complainant's petition for a writ of certiorari, and that the only questions open for review at this time are those that were before the court of appeals upon the second appeal. This, however, is based upon an erroneous view of the nature of our jurisdiction . . . by certiorari . . . Except in extraordinary cases, the writ is not issued until final decree . . . The decree that was sought to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application[2]. . .
>
> It is, of course, sufficiently evident that the refusal of an application for this extraordinary writ is in no case equivalent to an affirmance of the

[2]This was the situation in the case at bar, as is pointed out by the present petition (pp. 1-2).

> decree that is sought to be reviewed. And, although in this instance the interlocutory decision may have been treated as settling 'the law of the case' so as to furnish the rule for the guidance of the referee, the district court, and the court of appeals itself upon the second appeal, this court, in now reviewing the final decree by virtue of the writ of certiorari, is called upon to notice and rectify any error that may have occurred in the interlocutory proceedings."

See, also, *Burnet v. J. Rogers Flannery & Co.,* 286 US 524, 52 SCt 497, 76 LEd 1268, where certiorari was granted although petitioner's prior application for certiorari to review an earlier judgment of the Court of Appeals on the same point in the same case had been denied (282 US 889, 51 SCt 102, 75 LEd 784).

The two cases cited by respondent are wholly inapposite. In *Tyrrell v. District of Columbia,* 243 US 1, 37 SCt 361, 61 LEd 557, the certiorari granted was dismissed, because it was granted to review a supposedly erroneous instruction given to the jury by the trial Court and it later developed that, as no exception thereto had been taken at the trial, the question involved was not before the Court of Appeals and would not be open for consideration by the Supreme Court. In *Furness, Withy & Co. v. Yang-Tsze Ins. Assn.,* 242 US 430, 37 SCt 141, 61 LEd 409, the certiorari granted was dismissed, because it subsequently appeared that a later final decree in related proceedings was based upon an express compromise agree-

ment which was not disclosed in either the petition or reply.

(2) Respondent argues (pp. 9-10) that, since the question of construction of the contract is controlled by state or local law, "conflict among the circuits is not of itself a reason for granting the writ".

This is true, as was pointed out in *Ruhlin v. N. Y. Life Ins. Co.*, 304 US 202, 206, 58 SCt 860, 82 LEd 1290, 1292, cited by respondent; for the obvious reason that conflict among the circuits is inevitable on such questions under the rule of *Erie R. Co. v. Tompkins*, 304 US 64, 58 SCt 817, 82 LEd 1188, 114 ALR 1487.

However, the petition here is not based on any such ground. The petition points out (pp. 5-7) that the construction of the insuring clause of a leasehold policy involves an important question of local law as yet unsettled by any decision of California Courts or the Courts of any other state; that the decision of the Court of Appeals herein is probably untenable because in conflict with general principles of insurance law, and because in conflict with principles of contract law enunciated by California statutes and by decisions of the highest Court of that State.

That the showing made by the petition constitutes an appropriate basis for issuance of the writ is clear from the opinion in the *Ruhlin* case itself:

> "The Rules [Rule 38(5), Revised Rules of the Supreme Court] indicate that the Court will be persuaded to grant certiorari where a circuit

> court of appeals 'has decided an important question of local law in a way probably in conflict with applicable local decisions'. No such showing was attempted by the petition. Nor was it contended that the decision below was 'probably untenable' and therefore probably in conflict with the state law as yet unannounced by the highest court of the State."

In a footnote (p. 9, n. 8) respondent refers to the well settled California rule that ambiguities in an insurance policy will be construed against the insurer. However, he makes no contention that the portion of the policy construed by the Court of Appeals was, in any respect, ambiguous.[3]

> *National Automobile Ins. Co. v. Industrial Accident Comm.*, 11 Cal. (2d) 689, 81 P2 926, 927:
>
> ". . . Where, as here, the provisions of the policy are definite and certain there is no room for interpretation and the courts will not indulge in a forced construction in order to cast a liability upon the insurer which it has not assumed."

(3) Respondent cites (p. 10) several California cases in support of the Court of Appeals' construction of the terms "lease" and "leasehold" as comprehending a month-to-month tenancy.

None of these cases involved any question of interpretation remotely similar to the problem at bar. Some of them are cited in the opinion of the Court

[3]Nor did the Court of Appeals suggest the presence of any ambiguity.

of Appeals, and are sufficiently discussed in the brief (p. 7) attached to our petition.

The most recent of the cases cited by respondent is *Beckett v. City of Paris etc. Co.*, 14 Cal. (2d) 633, 96 P2 122; the definition there approved by the California Supreme Court is as follows (96 P2, 124):

> "A lease must include a definite description of the property leased and an agreement for rental to be paid at particular times *during a specified term.*" (Italics ours.)

In support of this statement the Court cites *Losson v. Blodgett,* 1 Cal. App. (2d) 13, 36 P2 147, wherein we find this language (36 P2, 149):

> "It will be noted that no term whatever is mentioned in the instrument. A valid lease of real property must set forth, in addition to the parties, a description of the premises, and the rental to be paid, the *term* for which the property is demised . . . Manifestly, the instrument lacks one of the necessary elements of a lease." (Italics by Court.)

It may be seen, therefore, that the California Courts have not failed to recognize the ordinary and popular definition of "lease". Nor does respondent dispute that it is this meaning, and not a technical legal definition, which must control here.

II.

Although respondent categorically asserts (p. 11) that the petition "presents no legal basis for certiorari" with respect to the Court of Appeals' blanket rejection of the trial Court's findings of fact, his argument to the point is so lacking in substance as to amount to an admission that certiorari should be granted.

Respondent does not dispute that the Circuits are in conflict as to the proper interpretation of Rule 52(a) FRCP; or that the scope of review over findings of fact exercised in the case at bar by the Court of Appeals was a departure from the accepted and usual course of judicial proceedings, and out of harmony with the great weight of federal authority. Nor does respondent even attempt to justify rejection of the finding that the insurance company relied on the representation[4] or the finding that respondent did misrepresent his tenure.

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[4]In a footnote to his Statement of the Case (p. 7, n. 5) respondent refers to a stipulation made at the second trial (SR 101). This stipulation was also referred to in the last opinion of the Court of Appeals (R 233, n. 2).

The stipulation was an admission of pleading directed to certain allegations contained in the third amended complaint, on which the second trial was had. This complaint, however, was later superseded (prior to the last trial) by a fourth amended complaint (R 1), from which these allegations were omitted by respondent.

In any event, the stipulation does not fairly admit of the inference attempted to be forced from it. It reads:

> "We also admit that prior to the issuance of said policy, both plaintiff and defendant were in doubt *as to the proper designation* of said interest. . . ."

Bearing in mind that the third amended complaint specifically alleged that when respondent applied for the policy he "fully ad-

Respondent's argument (p. 12) that the finding of falsity of the representation is "clearly erroneous" because "the record on the last appeal (No 9850) contains not one item of evidence . . . addressed to the proof of . . . falsity", is untenable.

As we pointed out (Brief attached to petition, p. 4), the entire record of the second trial was in evidence at the third (last) trial by stipulation of the parties. Prior to the fourth (last) appeal, in order to save expense of printing, it was stipulated that the transcript of record on the third appeal, which contained all of the evidence introduced at the second trial, was to be considered as a part of the record on the fourth appeal (No. 9850) without the necessity of reprinting; this stipulation appears in the transcript of record filed herein (R 227). In preparing the record for certiorari, the clerk of the Court of Appeals inadvertently overlooked the stipulation and forwarded to the Supreme Court only that portion of the record which had been newly printed. As soon as petitioner discovered the error and called it to the attention of the clerk, the latter certified and forwarded the balance of the record to the Supreme Court in the form of a supplemental transcript of record. The supplemental

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vised" petitioner that his predecessor in interest had a written lease not expiring until destruction of the improvements (Brief attached to petition, p. 3), it must be obvious that the stipulation is not an admission of doubt as to *what respondent's interest was*. The doubt, as was clearly stated, was as to *how to designate* the represented interest in the policy. It is not surprising that laymen should have been puzzled as to the appropriate language to describe the unusual tenure which respondent represented that he had. Nor did petitioner make any mistake in concluding that it might properly be described as a "leasehold interest".

transcript is and always was a part of the record on the fourth (last) appeal (No. 9850).

Respondent argues (pp. 12-13) that the finding of falsity was "clearly erroneous" because the evidence as to what tenure respondent in fact had was introduced mostly by respondent rather than by petitioner, and was introduced on the main issue of respondent's right to recover under the policy rather than on the issue raised by the affirmative defense of misrepresentation.

This cannot withstand analysis. The probative effect of evidence does not depend upon whether it is introduced by a plaintiff or a defendant. It is equally clear that factual questions pertinent to each of two or more issues raised by the pleadings do not for that reason justify (much less, require) the introduction of the same evidence more than once. Citation of authority would appear to be superfluous.

Dated, San Francisco, California,
May 18, 1942.

Respectfully submitted,
PERCY V. LONG,
Attorney for Petitioner.

LONG & LEVIT,
BERT W. LEVIT,
WILLIAM H. LEVIT,
Of Counsel.

Due service and receipt of a copy of the within is hereby admitted

this_____day of May, 1942.

_____

_____

Attorneys for Respondent.